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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 75-6289

INEZ MOORE,

~~Defendant~~-Appellant

-against-

THE CITY OF EAST CLEVELAND

~~Plaintiff~~-Appellee

ON APPEAL FROM ~~A JUDGMENT OF~~ THE SUPREME COURT OF OHIO

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE VARIOUS "HARDSHIP" PROVISIONS CITED BY APPELLEE HAVE NO RELEVANCE TO THE APPLICATION OF THE ORDINANCE TO INEZ MOORE.

Inez Moore was criminally convicted for violation of a local housing code ordinance, specifically §1351.02 which incorporates the definition of "family" contained in §1341.08. [1/] Violation of this ordinance, by virtue of §1345.99, exposes a person such as Inez Moore to criminal liability of up to $1000 and six months in jail for each day which she allows her grandchild to remain in her home.

The Appellee cites three "hardship" provisions which allegedly soften the blow which §1351.02 (incorporating §1341.08) inflicts on the constitutional rights of family members. These three provisions are the roomer ordinances, the guardianship statutes and the administrative appeal provisions of §1345.08 and Chapter 1311 of the ordinances. Even assuming that these mechanisms perform the function attributed to them by Appellee, their existence is irrelevant to the situation of Inez Moore. Mrs. Moore was in fact convicted of violating §1351.02 for allowing her grandson John Jr. to live in her home. This conviction is in itself conclusive evidence of the irrelevance of these hardship provisions. Indeed, Appellee concedes at p. 17 of its brief, that the "roomer" ordinance offers no solace to John Jr. and Inez Moore. As to the other two "hardship" provisions, Appellee would contend that Inez Moore, a criminal defendant, has an affirmative obligation to seek relief thereunder. Even if relief were likely under these avenues (Appellant suggests in Part II that the opposite inference is more apt), there is no obligation on a criminal defendant to exhaust "administrative" remedies prior to allowing himself to be prosecuted for violation of a criminal statute. This construction of the exhaustion of administrative remedies doctrine [2/] is unprecedented and irrational. Not surprisingly, Appellee has cited no case law in support of its position.

-/-

II. THE VARIOUS "HARDSHIP" PROVISIONS FAIL TO SAVE THIS ORDINANCE WHEN MEASURED AGAINST APPELLANT'S ARGUMENT THAT THE ORDINANCE UNDULY INTERFERES WITH THE RIGHTS OF BLOOD RELATIVES TO ESTABLISH A HOUSEHOLD TOGETHER.

Looking beyond the specific application of §§1351.02 and 1341.08 to Inez Moore and her grandson, these ordinances fail constitutionally because of their undue interference with the privacy and associational rights of blood relatives to establish a single household together. The so-called hardship or escape provisions cited by Appellee fail to save the ordinance when tested against this aspect of the Appellant's constitutional challenge.

As can be seen from an examination of the several ordinance provisions relating to roomers, the roomer provisions are actually quite limited. (See Reply Appendix, pp. 8-10). No child under 12 years of age and no aged (over 65) or infirm person may be considered a "roomer" without a special exception by the Board of Zoning Appeals; §1313.04. Any roomer must actually pay rent for the space which he occupies; §1313.01(r). The owner who collects the rent from the roomer must insure that his/her dwelling unit meets certain additional physical requirements; §1313.03. Finally, the resident owner of a single family home may have no more than two roomers on the premises and the resident owner of a two family dwelling (such as Inez Moore) may have no more than one roomer per dwelling unit. [3] §1313.01(s). The owner may only exceed these per person roomer limits if he/she purchases a license to operate a rooming house (§§1313.05, .06) and complies with all the additional requirements incident thereto. In addition there are no lower court decisions or other sources of information to support the apparent inference by the Appellee that the roomer provisions, despite these severe limitations, are applied so as to protect the rights of blood relatives to establish a household together.

The guardianship provisions of the Ohio Revised Code are also too limited to operate as safety valves for this ordinance, assuming arguendo that there is some reason to believe that they have been relied upon to perform this function. Ohio Revised Code Chapter 2111 creates procedures for the appointment of guardians for minors and incompetent persons. Accordingly,

only where the family members excluded from a home in East Cleveland are minors or incompetent persons, does Chapter 2111 provide any ostensible relief. Even then there are important reasons why guardianship may not serve as a meaningful avenue. The child's parents are natural guardians over the child (O.R.C. §2111.08); in order for a non-parent to be appointed as guardian, the parent must consent and effectively surrender his legal right to care, custody and control over his child. [4] In the case at bar, for example, John Sr. would have had to surrender his legal rights as a father and a parent as a condition to the issuance of letters of guardianship in favor of his mother. The rights which he would thereby be asked to relinquish are themselves indisputably fundamental. To condition freedom from prosecution upon the relinquishment of such fundamental rights is itself a violation of the Bill of Rights. Dunn v. Blumstein, 405 U.S. 330, 338-42. Furthermore there is no assurance from the language of §§1351.02 and 1341.08 that Inez Moore would procure any greater protection from criminal prosecution if she were issued letters of guardianship over John Jr. The words "ward" or "guardian" appear nowhere in the ordinances. We have only counsel's unsupported assertion that guardianship is in fact a "remedy."

The third and final hardship or escape provision suggested by the City, an appeal to the Board of Building Code Appeals, likewise provides no reasonable promise as a cure to the constitutional defects of the ordinances. Counsel for the Appellee offers his personal observation that in Inez Moore's case, relief "probably" would have been granted, "possibly" with "some stipulation(s)." Appellee's Brief, p. 18. Yet the very terms of the ordinance itself, §1311.02 (Appellee's Appendix, pp. 22-24), prescribe variances only when "in harmony with the general intent of such ordinances [i.e. §1341.08, defining family] and to secure the general welfare and substantial justice in the promotion of the public health, comfort, convenience, morals, safety and general welfare of the City." If we accept at face value the contentions of the City at pp. 8, 10-11 and elsewhere in its brief to the effect that the application of §1341.08 to the Moore family and to other similar families is

necessary to the promotion of these very same objectives, then it is difficult to imagine the Board lawfully granting a variance in such instances. And indeed this conclusion is partially supported by the Board's action in City of East Cleveland v. Hilson, where it refused to grant a variance for certain family members. The owner of the property in Hilson was subsequently charged and convicted of violating the same ordinance under which Ms. Moore was charged. [5/] In addition it should be pointed out that in this case, Inez Moore was never notified of her 10 day appeal rights but was instead consistently instructed by City officials that her only remedy was to make her grandson, John Jr., leave the home. See Appellee's Appendix, pp. 25-28.

III. THE CITY'S ARGUMENT REGARDING HARDSHIP EXCEPTIONS UNDERSCORES THE IRRATIONALITY OF THE LEGISLATIVE SCHEME.

The Appellant's position is that regardless of which level of scrutiny is chosen by the Court to review this ordinance under the equal protection clause, the City's purported justifications for the exclusion of the Moore family and similar families from the municipality of East Cleveland are constitutionally inadequate. In this connection, the City's identification of various escape measures which can be utilized to get around §§1351.02 and 1341.08 seriously undercuts its assertion that these ordinances are necessary to the attainment of certain legislative goals. If the narrow definition of family in §1341.08 of the ordinances is so essential to the prevention of overcrowding, traffic congestion, undue school burdens, etc. as Appellee argues, then these purposes are hardly served by the existence of various "escape clauses" which allow for the easy circumvention of §1341.08. So viewed, these escape clauses are counterproductive and their very availability raises important doubts about the argued-for rationality of §1351.02 and §1341.08.

~~Dated, Cleveland, Ohio, October 21, 1976.~~

Respectfully submitted,

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FOOTNOTES

1/ The East Cleveland Ordinance under which Inez Moore was convicted has been referred to interchangeably as a housing code ordinance and as a zoning ordinance throughout Appellant's and Appellee's Briefs. The zoning label is slightly inaccurate. The following is a brief description of the legislative scheme.

The Planning and Zoning Code of the City of East Cleveland (Part Eleven of the ordinances) contains in §1101.11 (Reply Appendix, p. 6) a definition of family identical to the language of §1341.08. Part Eleven goes on to provide for the classification of various uses (U-1 being single family dwellings; double houses; two-family houses; U-2 being apartment houses; etc.) and provides in §1121.03 that "no building...shall be...used except in conformity with the regulations prescribed in this zoning ordinance." (Reply Appendix, p. 7). This provision is enforceable criminally via §1105.99 (Reply Appendix, p. 7).

In this case however, the City chose to proceed instead under the criminal enforcement provisions of its Housing Code. The Housing Code is Title V of Part Thirteen of the East Cleveland Ordinances; Part Thirteen is entitled "Building Code." While the Zoning Code of the City of East Cleveland was adopted in the City's infancy in 1922 to govern the development of the City, the Housing Code was not adopted until 1961, evidently in an effort to guarantee the safety and integrity of existing structures. As with any housing code, its provisions regulate such matters as habitable floor area, minimum size of sleeping rooms, heating capacity, rubbish and garbage disposal, flue connections, etc.; §1351.03 et seq. Enforcement is provided for by the certificate of occupancy mechanism (§1347.01), by inspections together with notice to the owner "to repair, improve or demolish the structure" (§1345.03(a); Reply Appendix p. 11), by notice to vacate and actions at law to compel compliance (§1345.04; Reply Appendix p. 11) and by criminal penalties (§1345.99; Reply Appendix p. 11). Its purpose clause was previously quoted at p. 44 of Appellant's Brief and the subsequent section, §1343.03, provides that its provisions are "supplementary" to other provisions of the ordinances. (Reply Appendix, p. 10).

The fact that the City of East Cleveland chose to prosecute Inez Moore for violations of a Housing Code section instead of a parallel provision in the Zoning Code is of little consequence except that, with this clarification, some of the pretended justifications for the restricted definition of family in §1341.08 appear to be even more illogical, specifically the assertion that among the legislative objectives of §1341.08 were the prevention of an undue burden on the school system and the prevention of traffic and parking congestion.

2/ Appellee states at page 18 of its brief:

> Where the legislature has established a procedure for appealing adverse decisions, that administrative procedure must be exhausted before one can seek a court remedy. Thus, Appellant's failure to exhaust her administrative remedy, by failing to file a timely appeal, precludes this appeal because she lacks standing to make it.

3/ Appellee's claim at p. 17 of its brief that both Dale Sr. and Dale Jr. were properly considered roomers in Mrs. Moore's two family dwelling is inconsistent with §1313.01(s).

4/ See generally 41 O. Jur. 2d, Parent and Child, §22.

5/ City of East Cleveland v. Hilson, East Cleveland Municipal Court, Case No. 101,060; reversed by the Court of Appeals for Cuyahoga County as Case No. 30544 (1971). Journal Entry: Book 40, p. 609, 610; Corrected entry at Book 41, p. 345 (1971).

The defendant and his wife resided in a single family dwelling together with their two unmarried sons; a daughter, the daughter's husband and two minor grandchildren; and a minor niece. The Board of Building Code Appeals granted a variance for the minor niece but refused to authorize the continued presence of the married daughter, her husband and children. Evidence was introduced at trial that the daughter and her husband were irregularly employed and were in fact dependent upon Mr. Hilson and that the per person occupancy limits were not exceeded. The Municipal Court found Mr. Hilson guilty. His conviction was reversed on appeal on the grounds that Mr. Hilson had established that his daughter, her husband and their children were dependent upon him within the meaning of §1341.08(d). In its journal entry the Court of Appeals also ruled that the defendant's arguments that the ordinance was unconstitutionally vague and deprived him of property without due process of law were not well taken.

APPENDIX

EAST CLEVELAND ORDINANCES:

529.01 ENDANGERING CHILDREN.

(a) No person, being the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of such child, by violating a duty of care, protection, or support. It is not a violation of a duty of care, protection or support under this section when the parent, guardian, custodian or person having custody or control of a child treats the physical or mental illness or defect of such child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

* * *

529.05 CURFEW.

No minor twelve years of age or under shall be upon the streets or sidewalks or in a park or any other public place during the period from darkness to dawn, nor shall any minor thirteen to sixteen years of age, inclusive, be upon the streets or sidewalks or in a park or any other public place between the hours of 11:00 p.m. and 5:00 a.m., nor shall any minor seventeen years of age be upon the streets or sidewalks or in a park or any other public place between the hours of midnight and 5:00 a.m. unless accompanied by a parent, guardian or some responsible person over the age of twenty-one years, or a member of his family eighteen years or older. * * *

PART ELEVEN - PLANNING AND ZONING CODE

1101.11 FAMILY

"Family" means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit, but limited to the following:

(a) Husband or wife of the nominal head of the household;

(b) Unmarried children of the nominal head of the household or of the spouse of the nominal head of the household, provided that such unmarried children have no children residing with them;

(c) Father or mother of the nominal head of the household or of the spouse of the nominal head of the household;

(d) Notwithstanding the provisions of subsection (b) hereof, a family may include not more than one dependent married or unmarried child of the nominal head of the household or of the spouse of the nominal head of the household and the spouse and dependent children of such dependent child. For the purpose of this subsection, a dependent person is one who has more than fifty percent of his total support furnished for him by the nominal head of the household and the spouse of the nominal head of the household.

(e) A family may consist of one individual. (Ord. 5743. Passed 7-26-66.)

* * *

1103.01 PURPOSE.

The City of East Cleveland is hereby districted or zoned to promote the public health, safety, convenience, comfort, morals, prosperity and general welfare, including the promotion of home ownership, the protection of residence sections, the prevention of congestion, the increasing of trade and industrial efficiency, the conservation of property values, the assurance of adequate light and air and the limitation, control and regulation of buildings in the City in accordance with a well established plan of use, height, size and area for all property and its development in the City. (Ord. 4761. Passed 11-17-53.)

* * *

1105.01 ENFORCEMENT.

This Zoning Ordinance shall be enforced by the Building Inspector or Deputy Building Inspector, and wherever the term Building Inspector is used herein, it includes the Deputy Building Inspector. (Ord. 4761. Passed 11-17-53.)

* * *

1105.99 PENALTY.

Any person, or agent or officer of a corporation, who violates any of the provisions of this Zoning Ordinance shall for each offense be fined not more than one thousand dollars ($1,000) or imprisoned not more than ninety days, or both.

Each day such violation occurs or continues shall constitute a separate offense. (Ord. 4761. Passed 11-17-53.)

* * *

1121.03 COMPLIANCE WITH DISTRICT REGULATIONS.

Except as hereinafter provided, no building, structure or premises shall be erected or used except in conformity with the regulations prescribed in this Zoning Ordinance for the use, height, area and building line districts in which such building, structure or premises is located. (Ord. 4761. Passed 11-17-53.)

* * *

1125.09 ROOMING AND BOARDING HOUSES.

(a) In a dwelling or apartment occupied as a private residence, rooms may be rented or table board furnished to one or two persons in accordance with the provisions of sub-section (b) hereof, provided no window display or sign is used to advertise such use.

(b) Unless approved by the Board of Zoning Appeals, no person shall rent or lease premises or part thereof to roomers or furnish board in violation of the provisions of this subsection.

(1) In a single-family dwelling there shall not be more than two roomers.

(2) In a double house or a two-family dwelling there shall not be more than one roomer in each family unit except that upon written request by the owner and approval by the Board of Zoning Appeals there may be two roomers in one family unit and none in the other.

(3) In an apartment house there shall not be more than one roomer in each apartment.

(4) No person not living in such building shall rent or lease to any roomers.

(5) No person shall rent or lease to roomers on the third floor of any dwelling.

(6) No person shall rent or lease to roomers in the basement.

(7) No person shall furnish board to more than two persons.

(8) No person shall rent or lease rooms in any part of a building except his or her own suite or unit.

(9) Existing rooming houses, operated in Class U1 or U2 districts, may continue under temporary licenses, upon the approval of the Board of Zoning Appeals. (Ord. 4761. Passed 11-17-53.)

* * *

PART THIRTEEN - BUILDING CODE

TITLE THREE - LOCAL PROVISIONS

1313.01 DEFINITIONS.

* * *

(r) "Roomer" means a person other than a member of the family of a resident owner or of the family of a tenant, who rents one or more rooms, not constituting a complete dwelling unit, as a habitation in a dwelling or apartment house from such owner or tenant, except that all persons who occupy a dwelling unit on the third floor of any building originally constituting a dwelling shall be classed as roomers.

(s) "Rooming house" means any building or part of any building, other than a hotel, occupied in such a manner that certain rooms are leased or rented to a roomer or roomers, as herein defined, by an owner or tenant under the following conditions:

(1) A building in which rooms are rented to one or more roomers by an owner or tenant who does not reside in the building.

(2) A single-family dwelling in which rooms are rented to three or more roomers by a resident owner or tenant.

(3) A dwelling in which rooms are rented to one or more roomers on the third floor.

(4) A building containing more than one dwelling unit in which rooms are rented to two or more roomers by an owner or tenant occupying one of such dwelling units.

(5) A building in which a room or rooms are rented to be occupied by one or more roomers who are under twelve years of age or are infirm or aged.

For the purposes of this chapter, the words "rooming house" shall include motels, motor courts, lodging houses and tourist homes not meeting the requirements of a "hotel".

* * 8 *

CHAPTER 1311 BOARD OF BUILDING CODE APPEALS

(ordinances printed at pp. 22-24, Appellee's Brief)

* * *

1313.03 REQUIRED FACILITIES; CELLAR ROOMS, INGRESS AND EGRESS; COOKING PROHIBITED; HOUSING CODE COMPLIANCE.

No owner or tenant shall rent to roomers or operate a rooming house, foster home or hotel unless the premises and rooms so used shall comply with the following requirements:

(a) The premises must be equipped with one complete bathroom with toilet, lavatory and bathtub or shower facilities for each six persons or fraction thereof living in the premises, including all roomers, employees and members of families of the owner or tenant.

(b) No room located in a cellar shall be used for roomers or for rooming house, foster home or hotel purposes.

(c) The means of egress to the outside of the premises from any room shall meet with the approval of the Building Inspector and shall at all times be kept clear of obstructions. Any door which must be used in connection with such means of egress shall be provided with a lock which can be opened from the inside without the use of a key.

(d) No hot plates or other facilities for cooking are permitted in any rooms rented to a roomer except with the specific approval of the Board of Zoning Appeals.

(e) The building shall be operated and maintained in complete compliance with all provisions of the Housing Code of the City. (Ord. 5513. Passed 11-6-63.)

(f) No means of ingress to a bathroom shall be through a room rented to a roomer. No means of ingress to a room rented to a roomer shall be through any room rented to any other roomer. (Ord. 5801. Passed 2-21-67.)

1313.04 RENTING TO MINORS UNDER 12 OR THE AGED.

No owner or tenant shall rent any premises to be occupied by a roomer who is under twelve years of age or is infirm or aged, except with the approval of the Board of Zoning Appeals. Under no condition shall the Board approve a person as a roomer who in an emergency is unable to evacuate the building easily and readily without help and without impeding the progress of others; nor shall the Board permit any child under twelve years of age to occupy any part of the third floor of any dwelling unless such child is a member of the family of the owner or lessee who, with the remainder of his family, is domiciled on another floor of the dwelling. (Ord. 5513. Passed 11-6-63.)

9

1313.05 LICENSE REQUIRED; EXPIRATION.

No owner or tenant shall operate any rooming house, foster home or hotel within the City without having first applied for and obtained from the City Manager a license entitling him to do so, which license shall be valid until December 31 of the year in which it is granted.

* * *

TITLE FIVE - HOUSING CODE

CHAPTER 1341 DEFINITIONS.

1341.08 FAMILY

(ordinance printed at pp. 2-3, Appellant's Brief)

* * *

1343.01 TITLE.

Ordinance 5320, passed March 21, 1961, as amended, which is codified as this Title Five of Part Thirteen - Building Code, and hereinafter referred to as "this Housing Code," shall be known as the "Housing Code of the City of East Cleveland." (Ord. 5320. Passed 3-21-61.)

1343.02 PURPOSE.

Within the scope of this Housing Code as hereinafter defined, the purpose of this Housing Code is: to establish minimum standards necessary to make all dwelling structures safe, sanitary, free from fire and health hazards, and fit for human habitation and beneficial to the public welfare; to establish minimum standards governing the maintenance of dwelling structures in such condition as will not constitute a blighting or deteriorating influence on the neighborhood and the community; to protect property values and to maintain the character and appearance of the community and neighborhoods within the community; to fix responsibilities for owners and occupants of dwelling structures with respect to sanitation, repair and maintenance; to establish additional standards for multiple dwellings; to authorize the inspection of dwelling structures; to establish enforcement procedures; to authorize the vacation or condemnation of dwelling structures unsafe or unfit for human habitation, and to fix penalties for violations.
(Ord. 5717. Passed 4-5-66.)

1343.03 GENERAL SCOPE.

The provisions of this Housing Code shall be supplementary to all other provisions of the ordinances of the City relating to the construction, use and maintenance of residential buildings and shall apply to all buildings or portions thereof, excepting hotels as defined in Section 1341.10 which are used or designated or intended to be for residential occupancy.

* * *

1343.04 COMPLIANCE.

The owner, as defined in Section 1341.14, shall be responsible for compliance with all of the provisions of this Housing Code except where the responsibility therefor is specifically placed elsewhere.
(Ord. 5432. Passed 11-20-62.)

* * *

1345.03 NOTICE OF VIOLATION.

(a) Whenever the Building Inspector and other City department heads and their representatives find any dwelling structure or premises, or any part thereof, to be in violation of the provisions of this Housing Code, the Building Inspector shall give or cause to be given or mailed to the owner or operator of such structure or premises a written notice stating the violations therein. Such notice shall order the owner or operator, within a stated reasonable time, to repair, improve or demolish the structure or premises concerned. Such delivery or mailing shall be deemed legal service of notice.

* * *

1345.04 NONCOMPLIANCE WITH NOTICE.

(a) Whenever the owner, agent, occupant or operator of a structure or premises fails, neglects or refuses to comply with any notice of the Building Inspector, the Building Inspector may issue a notice to such owner, agent, occupant or operator ordering the structure or premises, or part thereof, to be vacated, or he may advise the Director of Law of the circumstances and request the Director of Law to institute an appropriate action at law to compel compliance, or both. Such notice shall be delivered, mailed or posted in the same manner as provided in Section 1345.03.

* * *

1345.08 BOARD OF BUILDING CODE APPEALS.

The Board of Building Code Appeals, as established by Chapter 1311, shall be the Board of Appeals for this Housing Code and its powers and duties and the procedures for appeal shall be as provided in Chapter 1311.
(Ord. 5642. Passed 6-1-65.)

* * *

1345.99 PENALTY.

Whoever violates any provision of this Housing Code or any rule or regulation promulgated hereunder or fails to comply herewith or with any written notice or written order issued hereunder, or whoever refuses to permit entry by the Building Inspector or other City department heads or their representatives at a reasonable hour, and whoever interferes with, obstructs or hinders such Building Inspector, other City department heads or their representatives while attempting to make such inspection shall be fined not more than one thousand dollars ($1,000) and imprisoned for six months for each offense. Each day such violation occurs or continues shall constitute a separate offense. (Ord. 5717. Passed 4-5-66.)

CHAPTER 1351 BASIC STANDARDS FOR RESIDENTIAL OCCUPANCY.

* * *

1351.02 LIMITATION ON OCCUPANCY.

The occupancy of any dwelling unit shall be limited to one, and only one, family and to any authorized persons occupying such dwelling unit with such family. (Ord. 5587. Passed 11-17-64.)

1351.03 HABITABLE FLOOR AREA.

(ordinance printed at p. 3 of Appellant's Brief)

1351.04 SLEEPING ROOMS.

Every room used for sleeping purposes shall contain not less than seventy square feet of habitable floor area if used for one occupant and not less than fifty square feet of habitable floor area per occupant if used by more than one occupant. (Ord. 5802. Passed 2-21-67.)

* * *